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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. A-511

MARTIN C. CALAWAY,
LUIGI GELFUSO, and
JOHN JOSEPH VACCARO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON MARKS, a member of
the law offices of
BURTON MARKS A PROFESSIONAL
CORPORATION
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone - (213) 655-5011
Attorney for Petitioners

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

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IN THE

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MARTIN C. CALAWAY,
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JOHN JOSEPH VACCARO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 3, 1975

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto (Appendix pp. 1 - 13). No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 3, 1975. A timely Petition for Rehearing was denied on November 13, 1975 (Appendix p. 13), and on December 4, 1975, Mr. Justice Rehnquist granted an extension of time in which to file this petition to and including January 5, 1976 (Appendix p. 14). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. **Whether the refusal of the Court of Appeals to allow petitioners an extension of time in which to file their opening brief, its refusal to allow the filing of a supplemental brief, and its limitations of argument, deprived petitioners of their right to counsel and to due process.**

2. **Whether the harmless error test may be applied to intentional misconduct on the part of a United States Attorney.**

3. **Whether the trial court's manner of excusing jurors for hardship violated Rule 43, F. R. Crim. P., and denied petitioners due process.**

4. **Whether petitioners were denied procedural due process, the right to confront witnesses, and a fundamentally fair trial because the jury was permitted to consider inadmissible hearsay evidence in determining petitioners' guilt of a substantive violation of 18 U.S.C. § 1955.**

5. **Whether the conviction for conspiracy below must be reversed because there is a special statute prohibiting conspiracy to violate 18 U.S.C. § 1955.**

6. **Whether there was sufficient evidence to support petitioners' conviction for violating 18 U.S.C. § 1955.**

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages,

supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section–

(1) "illegal gambling business" means a gambling business which–

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the

United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territorry or possession of the United States.

§ 1961 Definitions

As used in this chapter–

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code:

. . .

section 1955 (relating to the prohibition of illegal gambling businesses) . . . .

§ 1962 Prohibited activities

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Federal Rules of Criminal Procedure:

Rule 43. Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

STATEMENT OF THE CASE

Petitioners, along with four co-defendants not a party to this petition, were charged with conspiracy in violation of federal gambling statutes in a three-count indictment. Count one alleged a conspiracy among Martin C. Calaway, Peter John Milano, John Joseph Vaccaro, Luigi Gelfuso, Harry Coloduros, Santo Manfre, and Tony Endreola to conduct a gambling business in violation of 18 U.S.C. § 1955. The conspiracy allegedly violated 18 U.S.C. § 371. Count two of the indictment charged a substantive violation of § 1955, the conducting of a gambling business with gross revenue in excess of $2,000 on a single day in violation of California State law. Count three charged Calaway, Milano, Vaccaro, Gelfuso and Coloduros with traveling in interstate commerce with the intent to carry on unlawful gambling activities in violation of 18 U.S.C. § 1962.

After a fifteen-day jury trial, on August 31, 1974, the

jury returned its verdict. Petitioners Calaway and Gelfuso were found guilty as charged in counts one and two of the indictment, and not guilty as charged in count three. Petitioner Vaccaro was convicted on all three counts, and co-defendant Endreola was found guilty as charged in counts one and two. Santo Manfre was acquitted of all charges. Petitioners are presently free on bond pending this Court's determination of their Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

The Refusal Of The Court Of Appeals To Allow Petitioners An Extension Of Time In Which To File Their Opening Briefs, Its Refusal To Allow The Filing Of A Supplemental Brief, And Its Limitation Of Argument To Thirty Minutes, Deprived Petitioners Of Their Right To Counsel And To Due Process.

Petitioners' convictions followed a lengthy jury trial which resulted in a Reporter's Transcript on Appeal in excess of 3,000 pages. In spite of the length of that transcript, however, petitioners were not granted an extension of time in which to file their Opening Briefs and, thus, were required to file their briefs in the time period provided by the rules, without extension. After filing their Opening Briefs, petitioners sought to file a supplemental brief on appeal. That brief was rejected, and petitioners were thus unable to raise two issues before the Court of Appeals (see Reasons 4 and 5, *infra*). Finally, in spite of the fact that several of the

appellants were represented by separate counsel before the Court of Appeals, they were afforded only thirty minutes in which to argue their case.

It is petitioners' contention that the facts set forth above indicate that the Court of Appeals prevented counsel for appellants from adequately briefing and arguing their case before the court and that a Writ of Certiorari should issue to review the actions of the Court of Appeals.

There is no doubt that the right to appeal is an important one. See, *e.g.*, *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). The actions of the Court of Appeals below infringed upon that right to an unwarranted and unlawful extent. Because of the court's actions, petitioners were denied their constitutional right to the effective assistance of counsel on appeal. See *Anders v. California, supra.* The appropriate remedy for this denial would be a remand of this matter to the Court of Appeals for rebriefing and reargument.

II

The United States Attorney Was Guilty Of Misconduct, And It Was Error To Hold That That Misconduct Was Harmless.

The Court of Appeals determined that the United States Attorney's production of evidence regarding promises made to government witnesses, promises which indicated that the defendants were dangerous men, was "potentially prejudicial" (Appendix p. 11). The court went on, however, to state that the misconduct of the prosecutor, if any, was harmless (Appendix p. 12). It is petitioners' [1] contention that such conduct

[1] While the Court of Appeals stated that the prosecutorial misconduct issues were only raised by Vaccaro and Gelfuso (Appendix p. 11), it is petitioners' understanding that, the cases being consolidated per an agreement with Judge Chambers of the Court of Appeals, the issues raised by each appellant below were deemed to have been raised by all appellants to whom those issues were relevant. See Rule 3(b), F. R. CRIM. P.

cannot be harmless.

It has often been stated that a United States Attorney is not free to strike "foul" blows, *Berger v. United States*, 295 U.S. 78, 88 (1935), but prosecutorial misconduct remains a too common problem. *United States v. White*, 486 F.2d 204, 205-06 (2d Cir. 1973). It is petitioners' view that the application of the harmless error doctrine, see *Chapman v. California*, 386 U.S. 18 (1967), aggravates this problem, and that intentional misconduct requires automatic reversal. *United States v. Ott*, 489 F.2d 872 (7th Cir. 1963); Singer, *Forensic Misconduct by Federal Prosecutors–And How It Grew*, 20 ALA. L. REV. 227, 271 (1968).

Here, the answer of the witness Coloduros was admittedly known to the prosecutor in advance. The prosecutor asked a question which he knew would elicit an improper and inadmissible response. Thus, his conduct must be viewed as intentional, and the harmless error rule should not be applied to this conduct.

III

The Trial Court's Manner Of Excusing Jurors For Hardship Violated Rule 43, F. R. CRIM. P. And Denied Petitioners Due Process.

The trial judge below inquired of the jury panel, on the record and in the presence of the defendants or their attorneys, as to whether service upon the jury would impose

a hardship. Those who responded affirmatively filed past the judge and, after a brief discussion, all of them were excused from service. The discussion between the judge and the jurors was at the bench, unreported and in the absence of the defendants and their counsel.

It was apparently the position of the Court of Appeals that the "eminently practical procedure employed by the trial judge" (Appendix p. 10) was a ministerial or administrative act and, therefore, not a part of the criminal trial. It is petitioners' view that this is not the case, that the jury selection process is an important part of a criminal trial, and that that proceeding should have been recorded. Comparing the conduct of the trial judge with an act normally done by clerks is inappropriate, for, presumably, clerks conduct the part of the jury selection process for which they are responsible in accordance with a promulgated set of rules which are available to defendants and subject to challenge by them. The trial court below, on the other hand, excused jurors without recording the basis for its actions.

The method employed by the trial judge to excuse jurors was unlawful in violation of Rule 43, F. R. CRIM. P., and denied petitioners due process.

IV

Petitioners Were Denied Procedural Due Process, The Right To Confrontation Of Witnesses And A Fundamentally Fair Trial, Because The Jury Was Permitted To Consider Inadmissible Hearsay Evidence In Determining Petitioners' Guilt On A Substantive Violation Of 18 U.S.C. § 1955.[2]

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[2]Petitioners sought to raise this argument and the following one in their Second Supplemental Brief, which was refused by the Court of Appeals. See Argument I, *supra*.

It is petitioners' contention that, where the prosecution charges conspiracy to violate § 1955 along with the substantive offense, the general rule that the court has discretion to vary the order of proof on the conspiracy count by admitting hearsay statements without the foundational requirements of the corpus delicti being established, conflicts with the constitutional guarantees of procedural due process, confrontation of witnesses and a fundamentally fair trial under the Fifth and Sixth Amendments.

Petitioner Calaway was deprived of a fundamentally fair trial because the extrajudicial statements of his co-defendants, which may have been admissible to prove conspiracy, were certainly not admissible to prove the substantive violation of § 1955. Yet, this evidence was received in one trial, because both offenses were charged, and no limiting instructions were given to the jury regarding the purpose for which the hearsay declarations of alleged co-conspirators was admitted. The failure of the trial court to grant Calaway's motion to sever counts and/or, in the alternative, require the government to proceed on the charges separately, resulted in the government gaining the tactical advantage of being allowed to prove a substantive violation of § 1955 through extrajudicial statements of co-defendants, which were admissible only to prove conspiracy.

Therefore, even if the evidence was sufficient to support the guilty verdict, reversal is required because Calaway was not convicted in the "right way," according to proper legal procedures and standards:

> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense

of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way . . . .

"The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied . . . .

"The accused is entitled in any case to be tried under proper legal criteria . . . . "

Wilson v. United States, 250 F.2d 312, 324-25 (9th Cir. 1958);
United States v. Palermo, 259 F.2d 872, 882 (3d Cir. 1958).

"It may not be amiss to remind that the question is not whether guilt be spelled out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal court."

Bollenback v. United States, 326 U.S. 607, 614-15 (1946).

In *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284 (1975), this Court held that the offenses of conspiracy, as defined in 18 U.S.C. § 371, and unlawful gambling, as defined in 18 U.S.C. § 1955, were separate and distinct crimes, and

that defendants could be convicted of violating both statutes.

While defendants may be convicted of both crimes, extrajudicial hearsay declarations of alleged co-conspirators may not be admitted to prove conspiracy until the prosecution has proved the conspiracy independently of such statements. *Glasser v. United States*, 315 U.S. 60 (1942); *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963); *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972).

In the case at bar, the proof of conspiracy came almost entirely from the mouths of co-defendants. The same proof was offered on the substantive violation. There was no instruction to the jury to limit their consideration of the evidence to count one, nor was the jury instructed that such evidence was inadmissible unless the corpus delicti of conspiracy were proved *aliunde* the hearsay statements.

It is submitted that if the government is going to prosecute for both conspiracy and the substantive violation of § 1955, it must do so according to procedures which insure fundamental fairness. In *Krulewitch v. United States*, 336 U.S. 440 (1949), Mr. Justice Jackson, speaking of conspiracy, observed that:

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling

a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Id. at p. 453.

Moreover, the admission of co-defendants' extra-judicial statements to prove the substantive violation of § 1955 denied petitioners the right to confront and cross-examine witnesses against them. *Bruton v. United States*, 391 U.S. 123 (1968). According to *Bruton*, even if limiting instructions on the use of co-defendants' statements had been given, such instructions would have been wholly inadequate to dispel the prejudice to the right of petitioners to a fair trial.

It is submitted that the prejudicial manner in which the instant trial was conducted is judicially cognizable under the plain error rule. F. R. CRIM. P., Rule 52(b). It is not a miscarriage of justice to convict a guilty man, but if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain error rule in order to protect their own public reputation. *United States v. Vaugn*, 443 F.2d 92, 94 (2d Cir. 1971).

V

The Conviction For Conspiracy Must Be Reversed Because There Is A Special Statute Prohibiting Conspiracy To Violate 18 U.S.C. § 1955.

18 U.S.C. § 1962(c) provides as follows:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts."

18 U.S.C. § 1962(d) provides that:

> "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this subsection "

18 U.S.C. § 1961 defines "racketeering activity" as, among other things,

> "(B) Any act which is indictable under any of the following provisions of title 18, United States Code:
>
> . . section 1955 (relating to the prohibition of illegal gambling businesses)
>
> . . . . "

18 U.S.C. § 1961(4) defines "enterprise" to include "any individual . . or group of individuals associated in fact although not a legal entity "

"In drafting the Organized Crime Control Act of 1970, Congress manifested its clear awareness of the distinct nature of a conspiracy and the substantive offenses that might constitute its immediate end." *Iannelli v. United States, supra,* 95 S. Ct. at 1295. It would appear, therefore, that Congress has created a special statute, 18 U.S.C. § 1962(d), to penalize conspiracy to violate § 1955. Since count one charged the general conspiracy statute, 18 U.S.C. § 371, reversal on that count is required, since the specific statute controls over the general. *United States v. Bates,* 429 F.2d 557 (9th Cir. 1970).

VI

There Was Insufficient Evidence To Support Petitioners' Convictions For Violating 18 U.S.C. § 1955.

A. Co-defendant Milano was not lawfully convicted, for there must be more than "slight evidence" of a defendant's involvement in a conspiracy to allow the introduction against him of the statements of his alleged co-conspirators.

The court employed the "slight evidence test" in determining whether or not the statements of his alleged co-conspirators could be introduced against Peter Milano. It is petitioners' contention that the slight evidence test is inappropriate, that more than "slight evidence" of a person's involvement in a conspiracy must be shown before the statements of alleged co-conspirators may be introduced against him. WEINSTEIN, EVIDENCE, PARAGRAPH 104 [05] AND 801(d)(2)(E)(01) AT PP. 801-141-51 AT nn. 28-32

(1975); see *In re Winship,* 397 U.S. 358 (1970).

B. Since Milano's conviction was invalid, the convictions of petitioners cannot stand.

While the court may be correct that five or more persons must be *involved* rather than *convicted* in order to sustain convictions for violation of 18 U.S.C. § 1955, it is petitioners' contention that, since Milano's conviction was unlawful, all of the § 1955 convictions must be reversed. The reason for this is that the court could not determine whether the jury would have found violations of § 1955 had they determined that Mr. Milano was not guilty. See *Leary v. United States,* 395 U.S. 6 (1969); *Stromberg v. California,* 283 U.S. 359 (1931). Since the jury's verdict finding petitioners guilty was based upon their determination that Milano was guilty, the illegality of Milano's conviction means that the convictions of all petitioners must be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully suggested that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals in this matter.

Respectfully submitted,

BURTON MARKS

A Member of BURTON MARKS
A Professional Corporation

Attorney for Petitioners

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APPENDIX

OPINION OF THE COURT BELOW

[FILED OCTOBER 3, 1975]

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MARTIN C. CALAWAY, LUIGI GELFUSO, TONY ENDREOLA, PETER JOHN MILANO, and JOHN JOSEPH VACCARO, Defendants-Appellants.

Nos. 74-3357, 74-3367, 74-3241, 74-3272, 75-1255.

On Appeal from the United States District Court for the Central District of California.

Before: BROWNING, DUNIWAY and KILKENNY, Circuit Judges

DUNIWAY, Curcuit Judge

These are consolidated appeals from judgments of conviction under a three-count indictment charging violations of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. § 1955), 18 U.S.C. § 1955 (conducting, financing, managing, supervising, directing or owning an illegal gambling business), and 18 U.S.C. § 1952 (interstate travel in aid of racketeering enterprises, i.e., the same gambling business). Defendant Vaccaro was convicted on all three counts. Defendants Milano, Gelfuso, Calaway and Endreola were convicted only on the first two counts. Except for Endreola, all received concurrent four-year sentences under each count on which they were convicted. Endreola's sentence was two years and a $500.00 fine, both suspended, and three years probation. A variety of contentions are raised on appeal,

none of which requires reversal.

I. Admissibility of Hearsay Declarations of Conspirators.

Gelfuso and Milano argue that evidence of out of court (hearsay) statements by other conspirators, implicating them in the conspiracy, should have been excluded because the other, nonhearsay, evidence implicating them is insufficient to permit use of the hearsay statements against them. They do not claim, and could not, on this record claim, that the existence of the charged conspiracy was not proved. Their only argument on this question relates to proof that they were conspirators. That being so, only slight evidence was required to permit a jury to infer, or to support a finding that Milano and Gelfuso were participants in the conspiracy. See, *e.g., United States v. Turner*, 9 Cir., July 24, 1975, ... F.2d ..... (slip op. at 24). Also, a conspiracy may be proved by evidence that is entirely circumstantial, and items of circumstantial evidence must be viewed collectively, not in isolation. *United States v. Geaney*, 2 Cir., 1969, 417 F.2d 1116, 1121. "An otherwise innocent act of 'relatively slight moment' may, when viewed in the context of surrounding circumstances, justify an inference of complicity . . . . " *United States v. Ragland*, 2 Cir., 1967, 375 F.2d 471, 478 (citation omitted). It is too late to argue that the court erred in provisionally admitting the hearsay statements, subject to later motions to strike or for acquittal, see, *e.g., United States v. Turner, supra*, . . F.2d at . . (slip op. at 25).

The test governing admissibility of hearsay statements of coconspirators is whether there is substantial independent evidence, other than hearsay, which is sufficient to

support a finding that the conspiracy existed and that the defendant against whom admission is sought was a party to the conspiracy. *United States v. Snow*, 9 Cir., July 24, 1975, ... F.2d ..... at ..... (slip op. at 4-5); *United States v. Spanos*, 9 Cir., 1972, 462 F.2d 1012, 1014; *Carbo v. United States*, 9 Cir., 1963, 314 F.2d 718, 735; *Ong Way Jong v. United States*, 9 Cir., 1957, 245 F.2d 392, 394 & n. 1. All that is required is enough to make a *prima facie* case; the evidence need not compel a finding beyond a reasonable doubt. *Carbo v. United States, supra*, 314 F.2d at 737; see *United States v. Ledesma*, 9 Cir.,1974, 499 F.2d 36, 40; *United States v. Randall*, 9 Cir., 1974, 491 F.2d 1317, 1319-20; *United States v. Griffen*, 9 Cir., 1970, 434 F.2d 978, 983-84. Here, we need only consider whether the independent evidence sufficiently shows that Gelfuso and Milano were parties to the conspiracy.

In considering this question, we treat testimony by witnesses about statements made by Gelfuso or Milano themselves as part of the independent evidence of their participation in the conspiracy. Such statements by them are not received to establish the truth of what they said, but to show their own verbal acts.[1] A conspiracy is an agreement

---

[1] See Federal Rules of Evidence, Rule 801(c), which defines hearsay as "a statement . . . offered in evidence to prove the truth of the matter asserted," and the Advisory Committee's Note to Subdivision (c):

> Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay . . . . The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights. Fed. Rules of Evid. Ann., 95, Fed. Judicial Center, 1975.

See also *Creaghe v. Iowa Home Mutual Casualty Co.*, 10 Cir., 1963, 323 F.2d

or understanding, express or implied, between the conspirators. The usual way in which people reach agreements or understandings is by the use of words, oral or written. Indeed, it is difficult to conceive of a conspiracy formed or carried forward without the use of any words. Even sign language and codes are means of verbal communication.

The evidence shows that the conspiracy's purpose was to carry on an illegal gambling business in the San Fernando Valley area of Los Angeles. The first instigators were defendant Vaccaro and one Dubeck, an unindicted coconspirator who (along with his wife) was shot and killed in Las Vegas just before the trial of this case was to begin. Vaccaro and Dubeck came to Los Angeles from Las Vegas and were soon employed to manage a restaurant called Diament's 9000. It was owned in partnership by one Diament, defendant Calaway, an attorney, and perhaps one Ernstsen, the nature of whose interest, if any, is disputed. Vaccaro, Dubeck and Calaway were soon planning to put the restaurant into the gambling business. Vaccaro enlisted the help of one Klytta, the bartender, and, through him, one Coloduros, in obtaining financing. Finally, Vaccaro got Gelfuso into the scheme. Gelfuso persuaded Coloduras first, to store gambling equipment at the house of his late mother, and later to open the business there. Another participant in the scheme was one Deems.

Gelfuso and Vaccaro had agreed that Gelfuso and Milano would each get 20% of the profits and Vaccaro 60%. He ran the business. Gelfuso found the site, and was

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981, 984-5 and cases cited; *Safeway Stores, Inc. v. Combs*, 5 Cir., 1960, 273 F.2d 295, 296; *Atkins v. United States*, 10 Cir., 1960, 282 F.2d 53, 57.

to provide security and collect "markers" (gamblers' I O U 's). He was to share his cut with Dubeck and Calaway. The latter was to provide free legal services if needed. Milano was to provide free bail for persons arrested. When the game was moved out of Coloduros' house, Gelfuso arranged it. He received ledger sheets reflecting profits; he and Klytta visited at least one customer to collect a "marker."

There was plainly more than enough evidence, exclusive of hearsay, to support a finding that Gelfuso was a participant in the conspiracy. Admission of the hearsay, therefore, was not error. Counsel's argument that certain testimony was "beyond belief" betrays a basic misconception concerning the scope of appellate review. Both the jury and the trial judge were entitled to believe the government's witnesses. Except in unusual or extreme cases, the credibility of testimony is for the fact finder, not for this court.

As to Milano, the evidence, if restricted to non-hearsay, was not so strong, but it was sufficient. There was no question that a conspiracy existed; thus, slight evidence was all that was required to establish Milano's complicity. Exclusive of hearsay, the prosecution adduced four principal items of evidence: (1) testimony that Milano attended a large dinner meeting during a period of time in which the principal subject of conversation among most of the others in attendance, on a daily basis, was the Vaccaro-Dubeck-Calaway plan to organize a gambling enterprise; (2) testimony, supported by physical evidence, that Milano participated in the posting of bonds on two occasions for numerous persons arrested when the games were raided and that many of these people never had to pay for the bonds; (3) testimony concerning Milano's conversation with

Coloduros in an alley near the bail bond office; (4) Ernstsen's account of a lengthy conversation with Milano at the bail bond office just before the posting of the second round of bail bonds.

Standing alone, the fact that Milano attended the dinner meeting proves little. Mere casual association with people who are conspiring is not an offense. There is no testimony about what was discussed at the dinner, much less what Milano said or what others said to him. There was a second meeting that night during which the principal topic was the gambling plan, but Milano had already left. Nonetheless, Milano's presence shows that he was acquainted with the other conspirators even at the very beginnings of the conspiracy.

More significant, but still not compelling, is the evidence suggesting that Milano arranged for free bail bonds in accordance with a prearranged scheme for quick release of games employees in the event of arrests. That some of the people released never had to pay for their bonds is suspicious. Bail bondsmen seldom work for free. Still, the evidence that Milano was never paid for his services was far from conclusive: someone else could have paid him, even quite legitimately. But if so, it seems strange that that person's identity was never disclosed and that Milano never called him to testify. Nonetheless, although the circumstances are highly suspicious, Milano's participation in the release is, standing alone, consistent with his contention that he was merely engaging in the legitimate pursuit of his profession. But this evidence does not stand alone.

The remaining evidence, not entirely circumstantial, demonstrates that Milano knew of the conspiracy almost

from its inception and that in at least one respect he acted to further its objectives. That is all that is required to support a finding of his complicity; from knowledge of the conspiracy and an act in furtherance of it, participation in the illegal agreement may be inferred.

On the second weekend of the games' operation, Coloduros told Milano in an alley near the bail bond office that Deems was cheating at the blackjack table and that the customers would eventually notice. Milano did not ask "What are you talking about?" or "Who's Deems?" or "What blackjack table?" Instead, his pithy response was "I'll look into it." The inescapable inference is that Milano knew exactly what Coloduros was talking about. The response also suggests that Milano had some interest in or power over the conduct of the games.

Equally probative of Milano's knowledge of the conspiracy is the conversation at the bail bond office with Ernstsen. Referring to a newspaper item, Milano stated that the conspirators had not told him "in the front" that they were using crooked dice. From this it may be inferred that the conspirators did have a conversation with Milano "in the front" and that they told him of the gambling, even if not that it was rigged. Milano's next words show that he acted in furtherance of the conspiracy: "Because I'm getting a lot of heat from my friends I sent there." Testimony of prosecution witnesses indicated that one of the gambling operation's early problems was lack of clientele. On several occasions the games had to be cancelled because there were too few players. One of Gelfuso's principal responsibilities was providing customers, and because of initial difficulties Calaway undertook to scare up business as well. That Milano,

too, solicited business for the enterprise, when combined with the other evidence that we have outlined, provides an adequate basis for a finding that Milano acted in furtherance of the conspiracy. Thus, admission of coconspirator hearsay, which served to further entwine Milano with the conspiracy, was not error.

The cases cited by counsel, which purportedly held stronger nonhearsay evidence insufficient,are distinguishable. In *Spanos v. United States*, 9 Cir., 1972, 462 F.2d 1012, and *Ong Way Jong v. United States*, 9 Cir., 1957, 245 F.2d 392, the issue was whether a conspiracy existed, not, as here, whether there existed sufficient evidence to connect a defendant to a conspiracy whose existence had already been established. With respect to the latter issue, a lesser quantum of proof is required to support a conviction, and thus to support a preliminary finding for purposes of the coconspirator exception. In *Miller v. United States*, 9 Cir., 1967, 382 F.2d 583, there was no evidence that the defendant Joseph had acted in furtherance of the conspiracy. Here the government's evidence showed that Milano did know of the conspiracy and that he acted to further its objectives. In *United States v. Cianchetti*, 2 Cir., 1963, 315 F.2d 584, there was ample evidence that Cianchetti knew of the conspiracy and that he had on several occasions discussed participating in it with the other conspirators, but all that he ever told them was that "he might be able to help," and after he told them this, the conspirators never heard from him again. Thus, there was no evidence that he ever acted in furtherance of the scheme.

II. Endreola's Appeal

Endreola's principal argument is that the evidence against him was too thin, but his counsel's rambling, disjointed brief does not say whether the target of this argument is the sufficiency of all of the evidence to support the convictions or merely the adequacy of the foundation to support admission of hearsay evidence under the coconspirator exception. In either case, the volley misses the mark.

There was nonhearsay testimony (1) that Endreola met Klytta twice at Denny's, and Klytta took him to the games, presented him to Vaccaro, and put him to work, telling him how to approve markers and pointing out regular customers, (2) that Klytta saw Vaccaro pay Endreola, (3) that Endreola oversaw the preparation of ledger sheets, and (4) that Klytta would often call him to get an accounting of the night's profits from him. Endreola himself told Klytta that the reason he was present was to protect the interests of Milano. That was more than enough to support admission of the hearsay. Even aside from the hearsay there was sufficient evidence to support Endreola's conviction on both counts.

With the exception of those treated *infra* at Part V, Endreola's other arguments do not warrant discussion.

III. Alleged Irregularities in Excusing Prospective Jurors.

In lieu of an ordinary panel of veniremen, the trial judge, anticipating difficulties because of pretrial publicity, instructed the jury clerks to assemble all available prospective jurors in his courtroom. The judge did not tell them anything about the case, except that the trial would probably last two to three weeks and that the jury would be sequester-

ed. He then asked anyone who felt that such service would be a personal hardship to pass before the bench for a brief conversation. A number of veniremen were excused. Neither the defendants nor their counsel participated in these proceedings, and the conversations at the bench were not audible to them or recorded by the court reporter. Appellants do not claim that what the court did violates any provision of the Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. §§ 1861-1869. They do argue that the procedure violated 28 U.S.C. § 753(b), which requires the recording of "all proceedings in criminal cases had in open court," and Rule 43, F. R. Crim. P., which requires that the defendant be present "at every stage of the trial including the impaneling of the jury." We disagree.

The eminently practical procedure employed by the trial judge cannot reasonably be considered a part of the criminal trial. Ordinarily it falls to the jury clerks or commissioners to excuse jurors for hardship, a practice that has been approved by the courts. See, *e.g.*, *United States v. Kelly*, 2 Cir., 1965, 349 F.2d 720, 778-79; *United States v. Woodner*, 2 Cir., 1963, 317 F.2d 649, 651; *United States v. Flynn*, 2 Cir., 1954, 216 F.2d 354, 386-88. Surely the fact that this time the excusing was done by a judge sitting in his courtroom does not alter the essential nature of what was done, *cf.* 18 U.S.C. § 1866(c)(1). We note especially the strikingly similar facts of *Woodner*, *supra*, in which the Second Circuit failed to detect "the remotest possibility of prejudicial error" in a procedure whereby the trial judge heard hardship excuses, unrecorded, within the sight of but beyond earshot of the defendants and their counsel

IV. Promises to Prosecution Witnesses

Anticipating impeachment by the defense, the prosecutor, on direct examination, asked two of its witnesses, Ernstsen and Coloduros, whether there were any charges pending against them and whether any promises had been made in exchange for their testimony. Coloduros responded that the government had promised to relocate him and give him a new identity. Ernstsen's answer was as follows:

> You told me that the only promise you would make to me is that after this trial was over and as long as I was in the custody of the United States Government you would see that I was kept alive.

Each of these answers prompted defense motions for a mistrial, which the trial judge denied. On appeal only Vaccaro and Gelfuso urge that the motions should have been granted.

Both answers were potentially prejudicial. Precautions inexorably suggest danger, and it would have been natural for a juror to conclude that it was the defendants who were a danger to these witnesses' safety. The government has acknowledged that Coloduros' answer was known to the prosecution in advance. That being so, the question may have been improper. It would have been better to leave it to defense counsel to make the difficult tactical decision whether to risk a potentially prejudicial answer in quest of impeachment. Defense counsel might well have chosen to forego the impeachment effort which the prosecution was anticipating

Ernstsen's answer was apparently a surprise

The answer the prosecutor expected concerned a promise to disclose Ernstsen's cooperation to any judge before whom he might appear for sentencing. An affidavit by the prosecutor recites that Ernstsen was specifically instructed to say nothing about the threats to his safety. Despite the possibility of prejudice, we find no reversible error. The lengthy record discloses overwhelming evidence that Vaccaro and Gelfuso were guilty. As to them, the prosecution's misconduct, if any, was harmless.

V. 18 U.S.C. § 1955.

Appellants argue that Wharton's Rule bars separate convictions for conspiracy under 18 U.S.C. § 371 and for violations of 18 U.S.C. § 1955. They are wrong. *Iannelli v. United States*, 1975, 420 U.S. 770. Nor does *Iannelli* bar separate convictions of "lesser participants" such as Endreola; the opinion unequivocally states that the decision to seek dual convictions is committed to the sound discretion of the prosecutor. See 420 U.S. at 791. Finally, there was more than enough evidence, even exclusive of that implicating Milano, from which the jury could conclude that the "illegal gambling business" was conducted by five or more persons, as required by 18 U.S.C. § 1955(b)(1)(ii). What is required is that five or more persons be *involved*, not that five or more persons be indicted or convicted. Congress clearly meant to count all persons employed in the gambling business, not just those acting in a supervisory capacity. *United States v. Sacco*, 9 Cir. *in banc*, 1974, 491 F.2d 995, 1002-03; *United States v. Meese*, 8 Cir., 1973, 479 F.2d 41, 43; *United States v. Hunter*, 7 Cir., 1973, 478 F.2d 1019, 1021-22; *United States v. Harris*, 5 Cir., 1972, 460 F.2d 1041,

1049-50; *United States v. Riehl*, 3 Cir., 1972, 460 F.2d 454, 459.

The judgments of conviction are affirmed.

ORDER DENYING PETITION FOR REHEARING
[FILED NOVEMBER 13, 1975]

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MARTIN C. CALAWAY, LUIGI GELFUSO, TONY ENDREOLA, PETER JOHN MILANO, and JOHN JOSEPH VACCARO, Defendants-Appellants.

Nos. 74-3357, 74-3367, 74-3241, 74-3272, 75-1255.

Before: BROWNING, DUNIWAY and KILKENNY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States.

MARTIN CALAWAY, ET AL., Petitioners, v. UNITED STATES.

No. A-511.

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 5, 1976.

WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 4 day of December, 1975.

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STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on 1-2-76, I served the within PETITION FOR WRIT OF CERTIORARI (MARTIN C. CALAWAY, LUIGI GELFUSO and JOHN JOSEPH VACCARO vs. UNITED STATES OF AMERICA) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office, addressed to said party at the address as follows:

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

That three copies of said document have also been forwarded to:

SOLICITOR GENERAL
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 1-2-76, at Huntington Beach, California.

D. A. Standefer

Dean-Standefer Co., 326½ Main St., Huntington Beach, Ca.
(714) 536-7161